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No. 82-1178

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

FLOYD ROOD, *Petitioner*,

v.

PETER FINNEY, JR., and
UNITED PRESS INTERNATIONAL, INC., *Respondents*.

On Petition For Writ Of Certiorari
To The Louisiana Supreme Court

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the plaintiff in a civil action is deprived of any right arising from the Constitution or federal law when, after a motion for summary judgment is granted following ample opportunity for discovery, a state court rejects the plaintiff's allegation that he was prevented from establishing the existence of disputed material facts?

2. Whether the plaintiff in a civil action is deprived of any right arising from the Constitution or federal law when a state court declines to recognize a novel cause of action based on failure to retract an allegedly defamatory falsehood?

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BRIEF IN OPPOSITION

Respondents, Peter Finney, Jr. ("Finney") and United Press International, Inc. ("UPI"), respectfully pray that the instant Petition be denied. Review in this Court is inappropriate because Petitioner, Floyd Rood ("Rood"), fails to allege that the judgment below raises any question for review arising from the Constitution or laws of the United States. *See* 28 U.S.C. § 1257(3).

STATEMENT OF THE CASE

Despite the several misleading and erroneous statements contained in the Petition, the material facts, as set forth by the Louisiana Fourth Circuit Court of Appeal are uncontroverted:

> In August, 1979 plaintiff-appellant Floyd Rood filed this suit against United Press International

(UPI) and Peter Paul Finney, Jr., a UPI staff reporter in New Orleans. Plaintiff sought $310,000.00 in damages for a statement printed in one version of a UPI news article, the original of which was written by Finney, concerning Rood's unusual fund raising activities.[1] The particular version of the news story involved was one of several rewrites done by the Dallas regional office of UPI, which appeared in the Houston Chronicle on October 4, 1978. Mr. Rood, a professional golfer, had been involved in unique and well-publicized golf activities since the 1950's when he formed the "Floyd Rood Youth and Sports Foundation," a tax-exempt organization devoted to his youth assistance work. A major involvement of his, over these years, was "highway golf." In this activity, seeking substantial publicity for the project, Mr. Rood would embark on a cross-country tour, during the course of which he would hit golf balls across land and water. Money for the foundation would be raised from sponsors who would contribute a particular amount for each yard covered or who would purchase the golf balls used during the cross-country tour.

It was apparent that publicity was essential to this fund-raising operation. Rood employed advance men and public relations personnel to promote his activity in order to insure that he received the attention required in order to raise money for the fund. On one such golf tour, a clipping service counted over 350 newspapers reporting his activities. Rood had appeared on television and radio shows, had been featured in national magazines, and had been the subject of a book. The news article at issue in this case was originally written by Finney on October 3, 1978, at the beginning of one of Rood's "highway

[1] The Petition filed in the trial court alleged a cause of action for defamation. It did not allege a separate cause of action arising from UPI's or Finney's alleged failure to publish a retraction.

golf" tours. The proceeds of this particular tour were going to be used to purchase trailers which would provide information concerning drug rehabilitation.

In connection with this tour, Finney interviewed Rood and subsequently typed his story into a video display terminal in the New Orleans office of UPI. Rood's many fund-raising campaigns over the previous 20 years were discussed. The news story stated that Rood was about to begin "his last hurrah, a 7.5 million-yard trek from New Orleans to Shelby, Montana, by way of Los Angeles." Finney's news story went on to explain that the money raised would help fulfill Rood's dream of equipping 50 trailers with anti-drug abuse exhibits.

The third paragraph of the story, as originally typed and transmitted by Finney, read:

> "From the Atlantic to the Pacific, Rood has nudged screamers down America's interstates and rural dirt roads. For every person he has hit, he has missed millions, which is quite an accomplishment in 20 years of highway golf, the sport he invented to help solve *the* drug addiction problem." (emphasis supplied).

Finney then transmitted the article by computer command over telephone lines to the UPI office in Dallas, which was the regional editing center for UPI. At some point subsequent to Finney's transmission of the story from the New Orleans UPI office to Dallas its wording was altered. In one version of the article, the foregoing paragraph stated that "highway golf" was a sport invented by Rood to help solve "*a* drug problem." In another version of the article—and the version which is the subject of this particular litigation—which appeared in the Houston Chronicle, the concluding sentence appeared as follows ". . . highway golf, the sport he invented to help solve *his* drug addiction problem."

> Following the appearance of the story, as indicated, in the Houston Chronicle, Rood visited Finney in the UPI office in New Orleans where he objected to the news article's use of the word "his" in connection with the subject of drug addiction. Inasmuch as that word had not been used by Finney in his original article, his reaction was one of surprise. He then wrote an additional story on the subject, describing Rood's latest publicity campaign and praising his efforts to fight drug abuse in the United States. This follow-up story underscored the fact that Rood was hosting an "anti-drug addiction tournament" and that all of the proceeds on this tour would "help pay for his dream of 50 drug rehabilitation trailers."
>
> *Mr. Rood may have requested some sort of clarification when he met with Finney, although he does not remember that. Neither Rood nor his attorneys ever wrote defendants requesting a retraction of any statement made in the initial article. Consequently, there is not for the record any evidence of a formal retraction demand. Following Rood's visit to Finney, neither Rood nor his attorney contacted the news service until this lawsuit was filed in August, 1979.*[2]

After Finney and UPI filed an Answer to the Petition, both sides were afforded more than a year to undertake discovery. Rood deposed Finney and UPI reporter Joseph Reaves, who was flown back to New Orleans by UPI from covering the Iran-Iraq war. In addition, Finney and UPI answered Rood's interrogatories and complied with his requests for production of documents. Rood made no other requests for discovery, despite ample opportunity to do so.

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[2] *See* Rood v. Finney, No. 13023, at A-3 - A-6 (La. Ct. App. 4th Cir. June 28, 1982) (emphasis added) [hereinafter cited as *Rood* with page citations to Appendix to the Petition for Writ of Certiorari].

On October 3, 1980, Finney and UPI moved for summary judgment pursuant to *La. Code Civ. Proc.* art. 967. Summary judgment was granted on February 19, 1981, by the trial court and unanimously affirmed by the Fourth Circuit Court of Appeal on June 28, 1982. At oral argument before the court of appeals, Rood for the first time alleged that he had been prevented from developing relevant evidence in the trial court.[3] The Louisiana Supreme Court unanimously denied Rood's petition for a writ of certiorari on October 8, 1982. Thus, all ten Louisiana state court judges that have considered the instant case have concluded that Rood's claims are without merit.

REASONS FOR DENYING THE WRIT

REVIEW IN THIS COURT IS INAPPROPRIATE BECAUSE ROOD FAILS TO ALLEGE THAT THE JUDGMENT BELOW RAISES ANY QUESTION FOR REVIEW ARISING FROM THE CONSTITUTION OR LAWS OF THE UNITED STATES.

A. Discovery.

Rood alleges that he was prevented by Finney and UPI from discovering evidence that would create a disputed issue of material fact on the issue of constitutional malice.[4] According to his Petition for Writ of Certiorari, Rood was allegedly prevented from obtaining evidence because Finney and UPI "could not or *would not* recall the relevant events."[5]

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[3] Letter from Counsel for UPI to Fourth Circuit Court of Appeal (May 28, 1982).

[4] Throughout this litigation, Rood has conceded that he is a public figure. Petition for Writ of Certiorari at 6; Memorandum in Opposition of [sic] Motion for Summary Judgment at 5 (Dec. 2, 1980).

[5] Petition for Writ of Certiorari at 6 (emphasis added).

These allegations are wholly unsupported by the record below. Any failure to undertake discovery was solely by the choice (or neglect) of Rood. The record demonstrates that Finney and UPI provided Rood with the detailed affidavits of the four UPI employees that may have participated in the preparation of the UPI dispatch at issue. Despite ample opportunity, Rood chose to depose only one of those four individuals—Finney—who was voluntarily made available. On Rood's request, UPI voluntarily produced for deposition Joseph Reaves, a UPI reporter, who was flown to New Orleans by UPI while in the midst of covering the Iran-Iraq war. In addition, Finney and UPI fully answered Rood's interrogatories and complied with his requests for production of documents.

The record is devoid of any indication that Rood sought to depose any other employee of UPI or that UPI or Finney refused to comply with any discovery requests. To the contrary, UPI and Finney were wholly cooperative.[6] Rood voluntarily elected not to go to the expense of further discovery when he had the opportunity to do so. Indeed, Rood did not raise the issue of his alleged in-

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[6] Rood's unsupported suggestion that UPI and Finney have deliberately withheld relevant evidence from the courts below is, at best, decidedly unprofessional. *See* Petition for Writ of Certiorari at 7-8. In fact, the Dallas UPI office, where the dispatch at issue was disseminated, handles hundreds of news stories during each twelve-hour news cycle, and any individual staffer would work on a substantial portion of those stories. Despite diligent efforts by UPI to discover exactly when, how, and by whose action the changes in the dispatch's wording occurred, no additional evidence has come to light nor will there ever be any additional evidence. All of the pertinent evidence that will ever be available has been adduced and was thus considered by the Louisiana courts.

ability to obtain evidence until oral argument before the court of appeals.

The proper conduct of discovery is an issue to be resolved under Louisiana law. Louisiana courts have denied requests by parties opposing motions for summary judgment for additional time to undertake discovery where, as here, the failure to present evidence in a timely manner resulted from no more than a lack of diligence, *Fidelity National Bank* v. *Coleman American Moving Services, Inc.*, 398 So. 2d 556 (La. App. 1st Cir. 1980), or where the record does not show that any continuance was requested or denied by the trial court, *Farrar* v. *Swedish Health Spa*, 337 So. 2d 911 (La. App. 3d Cir. 1976). This doctrine of state law is even more applicable when an objection to the conduct of discovery is raised for the first time on appeal. Although Rood asserts, without supporting authority, that his alleged inability to obtain evidence somehow infringes his rights under the First Amendment, the Louisiana courts' application of state law governing the conduct of discovery establishes no basis for Rood to assert a claim arising under the federal Constitution.

Article 967 of the Louisiana Code of Civil Procedure sets out the strict factual requirement for defeating a motion for summary judgment under state law:

> When a motion for summary judgment is made and supported as provided above, an adverse party may not rest on the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided above, must set forth *specific facts* showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be rendered against him. (Emphasis added).

Rood has failed to provide any counter affidavits or other evidence that raises a disputed issue of material fact.

Under Louisiana law, Rood's failure to raise, by affidavits, depositions or other evidence, a single disputed factual issue is a sufficient basis upon which to grant a motion for summary judgment. *Cates* v. *Beauregard Electric Cooperative, Inc.*, 328 So. 2d 367, 369 (La.), *cert. denied*, 429 U.S. 833 (1976); *Schaefer* v. *Lynch*, 406 So. 2d 185 (La. 1981); *Mashburn* v. *Collin*, 355 So. 2d 879 (La. 1977). The mere possibility that Rood might have been able to raise a factual issue will not defeat a motion for summary judgment under Louisiana Law. *Mexican Gulf Fisheries, Inc.* v. *Aetna Insurance Co.*, 220 So. 2d 141 (La. App. 1st Cir. 1969).

Accordingly, summary judgment was properly granted under the laws of Louisiana and Rood has failed to raise a question for review that arises under the Constitution or laws of the United States.

B. Failure to Retract.

Rood further alleges that the courts below improperly declined to recognize an independent cause of action based on Finney's and UPI's failure to publish a retraction. Although Rood's allegations in this regard are admittedly unclear, he appears to assert that the failure to publish a retraction with reckless disregard for the truth ought to constitute an actionable tort "irrespective of whether there was actual malice in the initial publication."[7]

Once again, Rood's novel legal theory is devoid of a factual basis in the record below. It is undisputed that Rood at no time formally requested a retraction.[8] Indeed, UPI, at Rood's request, published a second news report

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[7] Petition for Writ of Certiorari at i.

[8] *Rood* at A-5.

that made it clear that Rood did not have a drug-abuse problem.[9] Given Rood's failure to demand a retraction and UPI's prompt publication of another story, at Rood's request, it is difficult to discern in what manner Rood can now allege that either Finney or UPI acted with constitutional malice by failing to publish a retraction.

In addition, Rood's apparent attempt to have this Court create a novel tort must fail because the claim was nowhere alleged in his original Petition in the trial court and because such a tort simply does not exist under Louisiana law. The Petition filed in the trial court reveals that the only action sued upon sounded in defamation and was based solely on a publication dated October 4, 1978.[10] There is not one word mentioned in the Petition of any failure to retract or of any events whatever subsequent to October 4, 1978. Moreover, the existence of a cause of action based on UPI's and Finney's alleged failure to retract must be resolved under applicable state law, of which the Louisiana courts are the final arbiters. The recognition or nonrecognition of a remedy arising under state law raises no issue of federal law for consideration by this Court. Since the Louisiana courts have considered and rejected Rood's theory of tort liability, there is no basis for review in this Court.[11]

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[9] *Id.*

[10] *Id.* at A-3.

[11] Unlike the states referred to on page 13 of Rood's Petition for Writ of Certiorari, Louisiana has not promulgated a right-of-reply statute.

CONCLUSION

For the foregoing reasons, Finney and UPI respectfully request that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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